79-1778

No.

Supreme Court, U. S.
FILED
MAY 7 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

JANUARY TERM, 1980

BRIAN FLISK, RECEIVER,

Plaintiff-Petitioner,

vs.

PEOPLES GAS LIGHT & COKE COMPANY,

Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

LAW OFFICES OF:
WILLIAM HENNING RUBIN
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In the
Supreme Court of the United States

JANUARY TERM, 1980

NO.

BRIAN FLISK, RECEIVER,
Plaintiff-Petitioner,

vs.

PEOPLES GAS LIGHT & COKE COMPANY,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITIONER BRIAN FLISK, RECEIVER, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court denying his Petition for Leave to Appeal to the Supreme Court of Illinois, pursuant to Rule 315 (a)(b) of the Rules of the Supreme Court of Illinois.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257, Subsections 2 and 3.

Petitioner prays that a writ of certiorari issue to the Supreme Court of Illinois requiring it to vacate its order denying "The Petition for Leave to Appeal to the Supreme Court of Illinois pursuant to Rule 315(a)(b) of the Rules

of the Supreme Court of Illinois" which denied leave to appeal from the order of the Appellate Court of Illinois First District.

STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

* * *

AMENDMENT IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT VI:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in these cases in the land or naval forces, or in the Militia, when in actual service in times of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws."

REASONS FOR GRANTING WRIT OF CERTIORARI

The instant case meets the requirements for review by this Court as set forth in Supreme Court Rule 19, paragraphs 1 and 2.

The same principal applies in this case as was applied in the decision of the Supreme Court in the case of *Faye* v. *Noia* (1963) 372 U.S. 391, 9 L Ed 2d 837, 83 S Ct 822, where a state prisoner was not barred from habeas corpus by his failure to have timely sought certiorari in the Supreme Court of the United States from the adverse decisions by the Appellate Court of the State.

In accordance with that case, the Supreme Court is mandated to grant a writ of certiorari to the individual who is denied due process because of technical errors.

The Court is also called upon to determine whether or not the court when empanelling a jury is required to order a court reporter to be in attendance and to take testimony especially in the case at bar where the petitioner paid his fee for a jury and there is no record that either the court or the opposing counsel made any effort to call the counsel of the defendant and advise him that the case was called for trial either prior to date of trial or on the date of trial.

ORDER BELOW

The Order of the Supreme Court of Illinois denying Petition for Leave to Appeal to the Supreme Court of Illinois pursuant to Rule 315 (a)(b) is as follows:

> "Petition for Leave to Appeal to the Supreme Court of Illinois denied the 30th day of January, 1980."
>
> Motion to stay mandate issued February 27, 1980.

STATEMENT OF THE CASE

Respondent instituted legal proceedings against Petitioner for the use of gas at a building commonly known as 9816 South Bishop Avenue, for which petitioner was appointed receiver pursuant to order of Court in the Circuit Court of Cook County, Illinois, the Hon. Archibald Carey presiding.

Subsequently the Petitioner as Receiver filed his Final Report and Account, and was discharged as receiver. A cashier's check was issued by the University National Bank on whose behalf the proceedings were instituted in the Circuit Court of Cook County and for whom Petitioner was acting as Receiver. The bill for the use of gas was paid in full, as evidenced by the cashier's check, a copy of which is attached as an exhibit in the Appendix hereto.

Petitioner made a motion to strike and dismiss the Complaint and on the date of the trial which Petitioner had no notice of, the Judge's minute book reflects that Respondent then stated that it admitted the payment of the bill for which Petitioner acted as receiver; but that there were other bills due and owing from other buildings which was false and untrue since Petitioner had never been personally a customer of the Respondent at those addresses additionally named by the Respondent which are commonly known as: 5229 South Greenwood, 4897 South Wabash, and 4300 South Drexel.

ARGUMENT

POINT ONE

A VOID JUDGMENT CAN ALWAYS BE ATTACKED: THERE IS NO STATUTE OF LIMITATIONS AND RESPONDENTS CANNOT USE A TECHNICALITY TO AVOID EXPUNGING A VERDICT OF THE JURY AND THE ENTRY OF A JUDGMENT BASED ON A COMPLAINT THAT DOES NOT CONTAIN ANY ALLEGATIONS OF ANY INDEBTEDNESS FOR GAS SOLD TO SPECIFIC PROPERTIES.

The Supreme Court of the United States in: *Giglio* v. *U.S.*, 405 US 160, 31 L Ed 2d 144, 92 S Ct 763, held:

> "A new trial is required if the false testimony could have in reasonable likelihood affected the judgment of the jury."

In the case at bar, the jury could not have found that Petitioner was liable for the payment of the gas bills at 5229 South Greenwood, 4897 South Wabash, and 4300 South Drexel when there were no allegations in the Complaint stating that Petitioner-Receiver was liable for those bills.

In the case of *Chicago Title and Trust Co. Trustee* v. *University National Bank,* 75 CH 5229, Petitioner acted as Receiver. Under no circumstances could Petitioner presume that then he would be sued individually when the original case was against Petitioner as Receiver of the property.

The Court Order entered by the Hon. Archibald Carey discharged Brian Flisk as Receiver and that was the end as far as Petitioner was concerned, of any litigation concerning the property at 9016 South Bishop Avenue.

Counsel for Petitioner instead of being a lawyer would have to have been a magician or a prophet to anticipate that respondents would after institution of suit against petitioner then claim indebtedness for other buildings.

POINT TWO

LIABILITY CANNOT BE IMPOSED UPON PETITIONER WHO WAS THE RECEIVER IN THE SAME PROCEEDINGS FOR ALLEGED BILLS THAT HE HAD NO LIABILITY FOR THE PAYMENTS THEREFOR, AND DID NOT HAVE AN OPPORTUNITY TO CONTEST.

The case of: *Harold Whitely Petitioner* v. *Warden of Wyoming State Prison,* 401 US 560, 28 L Ed 2d 306 stands for the proposition that before an arrest can be made and a search warrant obtained, the judicial officer issuing the search warrant must be supplied with probable cause.

That same principle applies to the Complaint that it be set forth in a clear concise language allegations as to what a plaintiff is claiming and charging to enable the defendant (Petitioner) to properly respond to the allegations of the Complaint.

When a Complaint is not amended and the Plaintiff obtains judgment based on facts that are not related to in the Complaint it is a complete abuse of judicial process and should not be condoned by this Court irrespective of whether the lawyers or the judge is responsible for such conduct. It is this kind of procedure that the Supreme Court of the United States is called upon to ensure due process.

It is on this theory that the decision was rendered by this Court in the case of: *Fay* v. *Noia, ibid.* That Petitioner has a right to come into court to show that the evidence presented against him as to his personal liability was false and perjured.

That due process cannot be obtained when a jury is used to making a finding of liability without a court reporter.

That due process requires the presence of a court reporter in that instance.

This Court has in many instances determined that in order for a judgment to be entered either by the judge or a jury the evidence submitted to either one of them must be true and convincing irrespective of whether the finding must be on the majority of the evidence or a preponderance of the evidence.

POINT THREE

THE VERIFICATION OF A COMPLAINT CANNOT BE MADE BY AN ATTORNEY FOR A CORPORATION SINCE SUCH VERIFICATION IS STRICTLY HEARSAY, AND THE COURT IS BARRED FROM ACCEPTING SUCH VERIFICATION AS TRUE AND CORRECT.

There must be clear, concise, and convincing evidence to support Respondent's Complaint against the Petitioner.

This contention is supported by *Napue* v. *State of Illinois,* 356 US 264, 3 L Ed 1217, where this Court determined that a conviction obtained through the use of false evidence must fall under the due process clause of the Fourteenth Amendment.

The Respondent when it filed suit for the use of gas at 9016 South Bishop Avenue, should have dismissed the suit when it became cognizant of the fact that the Plaintiff's bill was paid in full and nothing was owing.

Instead Respondent attempted to save face by having someone state to the Court that Petitioner owed for gas at other addresses, which was false and untrue.

That the trial court, upon being apprised of this situation whether it occurred prior to the jury returning a

verdict or after a jury rendering a verdict, it was mandatory to vacate the jury's finding and vacate the judgment.

That under the Civil Practice Act of the State of Illinois the Respondent cannot change the allegations of the Complaint without formally amending the complaint and if an amendment had been made and a copy served upon petitioner, he would have responded stating that he was not personally a customer of the Gas Company at those addresses and had no personal responsibility therefor.

That this information first came to the attention of the Petitioner when a citation to discover assets was served upon him. That an examination of the file then revealed that a jury had been empanelled *without a court reporter* and without notice to the Petitioner's Counsel, which found for the Respondent and the jury returned a verdict in favor of the Respondent.

That Petitioner's Counsel filed a Motion to Expunge from the record the jury finding and vacate the order of judgment entered against the Petitioner.

That the Order that was entered was not against Petitioner as Receiver, but against him personally.

The trial court was apprised of the false evidence, that Petitioner was not the customer at the addresses claimed, that he had no opportunity to respond and disclaim any interest in those buildings, that he never was a customer of the Gas Company at those buildings. It is just this type of situation that is encompassed by the decision of the Supreme Court in: *Napue* v. *Illinois, ibid.*

Napue v. *Illinois, ibid,* states a very important principle which is as follows:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a

tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, *People* v. *Savvides,* 1 NY 2d 554, 557, 154 NYS 2d 885, 887, 136 NE2d 853, 854, 855.

"It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter 'what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." (P 1221, 3 L Ed 2d)

In the case of: *Mapp* v. *Ohio, ibid,* Justice Black makes a very important finding in his concurring opinion when he states:

"Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." (P. 1094 6 L Ed 2d)

In *Weeks* v. *U. S.,* 232 US 383, 58 LEd 652, this Court held:

"If evidence seized in violation of the Fourth Amendment can be used against an accused, his right to be secure against such searches and seizures is of no value and might as well be stricken from the constitution." (232 US at 397)

The same principle applies in this case when the addresses for which Respondent seeks payment are not set forth in the Complaint.

POINT FOUR

PETITIONER EXHAUSTED THE REMEDIES AVAILABLE TO THEM IN THE COURTS OF THE STATE.

Petitioner filed a Petition for Leave to Appeal in accordance with Section 315 (a)(b) of the Rules of the Supreme Court of Illinois which the Supreme Court of Illinois denied, irrespective of the fact that Petitioner attached as an exhibit a cancelled cashier's check of the University National Bank showing payment in full for the indebtedness that was sued upon, but the Supreme Court of Illinois refused to hear the case on a technicality, which was that a notice of appeal had not been filed within the 30 day period after the jury rendered a verdict in favor of Respondent, irrespective of the fact that the Petitioner had no knowledge of the entry of that void judgment which was based on false evidence and presented by the Respondent.

Petitioner contends that under *Napue* v. *Illinois, ibid,* and *Whitely* v. *Wyoming, ibid,* this Court is mandated to direct that the Supreme Court of Illinois vacate the judgment against petitioner and a new trial be held.

POINT FIVE

THE SUPREME COURT OF THE UNITED STATES IS REQUIRED TO EXERCISE SUPERVISORY AUTHORITY TO ENSURE DUE PROCESS.

The supervisory power of the Supreme Court of the United States over the entire judicial system, requires that all judgments unsupported by proper complaints or amendments thereto with an opportunity of defendants to

file responsive pleadings thereto must be vacated and set aside.

The above mentioned theory is supported by *Mapp* v. *Ohio, ibid,* which supports the proposition that the

> "use of evidence obtained in violation of the Fourth Amendment derives not from the supervisory power of this Court over the federal judicial system, but from constitutional requirements." (6 L Ed 2d, p. 1103)

That same reasoning applies to the states as well as to the federal courts. Just as the federal courts are barred from denying "due process" the state courts are barred from rendering decisions in violation of due process.

Just as *Mapp* v. *Ohio* reflects that the Supreme Court exercised supervisory power over the state courts, supervisory power is necessary over the case at bar which is recognized by the Supreme Court in *Mapp* v. *Ohio, ibid,* 1103.

CONCLUSION

The case presents an important issue for the Supreme Court to decide, namely that judgments must be based on the pleadings and the proof must conform to the pleadings.

That unless amendments are made to conform to the proof the judgments must fall. That it has always been established law in the State of Illinois that a judgment is based on proof and the proof must conform to the pleadings; otherwise, leave is granted upon motion to amend the pleadings to conform to the proof.

Respondent made no attempt to amend the pleadings to conform to his proof, the reason being that no proof was ever made.

It is respectfully submitted that no jury can be impanelled for purpose of rendering a verdict either in a civil case or in a criminal case without a court reporter to transcribe the evidence submitted. And the Defendant has a right to be able to "examine and digest" the evidence if any, submitted against him, to enhance the principle of due process, and to prevent violations under the Fourth and Fourteenth Amendments to the Constitution of the United States.

The cost of the court reporter should not limit the rights of defendants to "justice-due process".

It is respectfully submitted that the Petition for Writ of Certiorari to the Supreme Court of Illinois should issue forthwith.

BRIAN FLISK, Petitioner
By WILLIAM HENNING RUBIN
His attorney

Law Offices of:
WILLIAM HENNING RUBIN
188 W. Randolph—714
Chicago, Illinois 60602
263-6780

I CERTIFY That the foregoing Petition is presented in good faith and not for delay; and is restricted to the grounds specified in paragraphs 1 to 23 inclusive.

APPENDIX

App. 1

Exhibit "A"

CCG-2 ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County DEPARTMENT Chancery CIRCUIT COURT

(COUNTY) (MUNICIPAL) (DIVISION) (DISTRICT)

JUL 29 1976

JUDGE Samuel B. Epstein

Chicago Title & Trust Company, a Corporation, as Trustee under Trust Agreement dated January 1, 1966 and known as Trust No. 51217, Plaintiff,

vs.

Leo J. Austell, Dorothy Austell et al Defendants

NO. 75CH5229

ORDER

This cause coming on to be heard upon defendants, Leo J. Austell and Dorothy Austell's, petition under Section 72 of the Illinois Civil Practice Act, to vacate all defaults and to vacate ex parte decree of foreclosure; due notice having been served; and the Court being fully advised

It is hereby ordered as follows:

1). That the Sheriff's Sale heretofore set is hereby cancelled and

2). That the defendants, Leo J. Austell and Dorothy Austell shall reimburse the plaintiff for the cost of publication for Sale.

3). That all defaults as to defendants Leo J. Austell and Dorothy Austell are hereby vacated and the decree of foreclosure is hereby vacated and set aside;

(CONTINUED ON PAGE 2)

Name Lemuel E. Bentley

Attorney for Defendants - Austell

Address 100 N. LaSalle

City Chicago, Ill. 60602

Telephone FR 2-0257

7/29/76 19

ENTER:

Judge

76C29 1004

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

PAGE ONE OF TWO PAGES

R14 Exhibit "A"

CCG-1 ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

County DEPARTMENT Chancery
(COUNTY) (MUNICIPAL) (DIVISION) (DISTRICT)

Page Two ;
Chicago Title & Trust Co,
"
Leo J. Austell, etal

NO. 75 CH 5229

ORDER

Continued from page one ;

over objection of plaintiff and filing by plaintiff of its Motion to Dismiss the Sec. 72 petition of defendant, and affidavit in support thereof. Defendants' 72 Motion is dismissed. Plaintiff's Motion is den.

4. That leave is hereby granted defendants, Leo J. Austell and Dorothy Austell, to answer or otherwise plead to plaintiff's complaint within seven (7) days.

5. That leave is granted plaintiff seven (7) days to answer or otherwise plead thereto thereafter.

6. That BRIAN FLISK, of 4705 S. State Street, Chicago, Illinois, is hereby appointed Receiver for said property located at 9136 South Richop Avenue, Chicago, Illinois. That bond for said receiver is hereby set for $ 5,000.00.

7/29 19 76

Samuel E. Bertholf
Address 100 N. LaSalle
City Chicago, Illinois 60602
Telephone FR 2-0252
Attorney for Defendants

ENTER: JUL 29 1976

Samuel B. Epstein
Judge

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

App. 3

Exhibit "B"

CCG-4 (6) ORDER

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY (COUNTY) (MUNICIPAL) DEPARTMENT CHANCERY DIVISION (DIVISION) (DISTRICT)

CIRCUIT COURT

CHICAGO TITLE AND TRUST CO., and UNIVERSITY NATIONAL BANK,

Plaintiffs,

v.

LEO J. AUSTELL, et al.

MAY 10 1977

ARCHIBALD J. CAREY, JR.

NO. 75 CH 5229

ORDER

This cause coming on to be heard upon the MOTION of plaintiff due notice having been served, and both parties present through their respective attorneys, and the court being fully advised.

It is hereby ordered that any and all sanctions ordered heretofor entered against the defendants, LEO J. AUSTELL and DOROTHY AUSTELL, are hereby vacated and set aside.

It is hereby further ordered that the cause herein be and the same is hereby dismissed without further costs to either party.

That the Court reserves jurisdiction to consider the report of the RECEIVER and to approve such report and to enter such orders as may be appropriate and not creating any lien upon the real estate in questi herein.

Name LEMUEL E. BENTLEY

Attorney for Defendants - Leo J. Austell & Dorothy Austell, 19

Address 100 North LaSalle Street

City Chicago, Illinois 60602

Telephone 372-0252

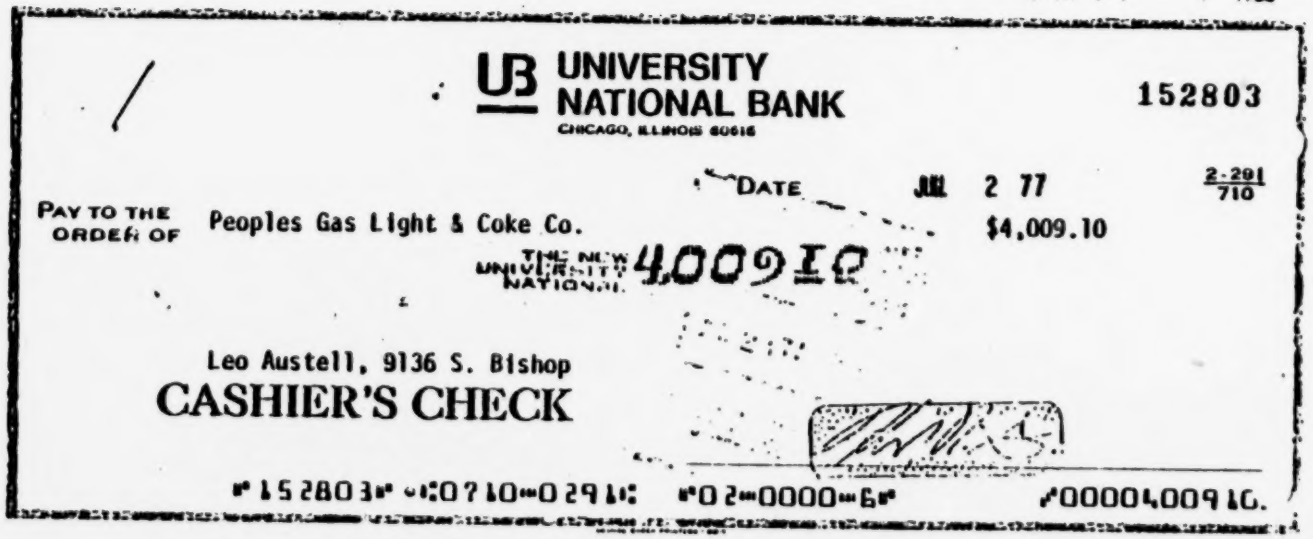
ENTER:

Archibald J. Carey
Judge

MORGAN M. FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY

77C1S 1126

Exhibit "C"



UB UNIVERSITY NATIONAL BANK
CHICAGO, ILLINOIS 60616

152803

DATE JUL 2 77

2-291
710

PAY TO THE ORDER OF Peoples Gas Light & Coke Co.

$4,009.10

THE NEW UNIVERSITY NATIONAL 4009 10

Leo Austell, 9136 S. Bishop

CASHIER'S CHECK

⑈152803⑈ ⑆0710⑆0291⑆ ⑈02⑈0000⑈6⑈ ⑈00004009 10⑈

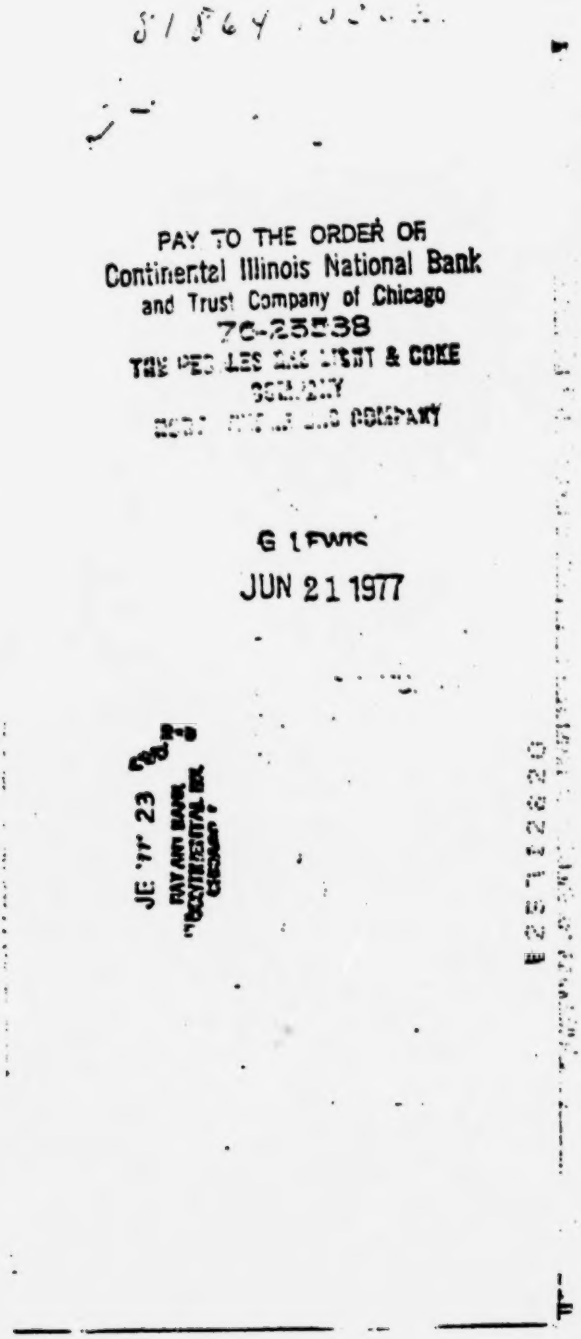

PAY TO THE ORDER OF
Continental Illinois National Bank
and Trust Company of Chicago
76-23538
JUN 21 1977
JE '77 23
E 2 5 1 1 2 8 2 0

Exhibit "D"

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLES GAS LIGHT & COKE CO., Plaintiff-Appellee,	)	
vs.	)	No. 79-1272
BRIAN FLISK, Defendant-Appellant.	)	

O R D E R

The motion of defendant-appellant to vacate the order of dismissal or in the alternative to certify this cause to the Supreme Court of Illinois in accordance with Rule ~~308~~ 316 of the Illinois Supreme Court rules is denied.

Dated at Chicago, Illinois, this 27th day of September, 1979.

ENTER: ORDER ENTERED SEP 27 1979

Seymour Simon, Presiding Justice

Daniel J. McNamara, Justice

Helen F. McGillicuddy, Justice

Dom J. Rizzi, Justice